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September 7, 2016

Via E-File

National Energy Board
517 10th Avenue SW
Calgary, AB T2R 0A8

Attn: Sheri Young, Secretary of the Board

Dear Sirs/Mesdames:

Re: Energy East Pipeline Ltd. and TransCanada PipeLines Limited – Energy East Project and Asset Transfer, and Eastern Mainline Project ("Energy East")
File No. OF-Fac-Oil-E266-2014-01 02
Hearing Order OH-002-2016

Timiskaming First Nation's Submissions in Support of Transition Initiative Kenora's Motion and the letter from Stratégies Énergétiques and the Association québécoise de lutte contre la pollution atmosphérique requesting Members Gauthier and Mercier to recuse themselves from the Energy East Panel

We act as legal counsel for Timiskaming First Nation (TFN). The purpose of this letter is to provide further submissions in regard to whether National Energy Board (Board) Members Gauthier and Mercier should recuse themselves from the Energy East Review Panel for reasonable apprehension of bias as submitted by legal counsel for Transition Initiative Kenora (TIK) and Stratégies Énergétiques and the Association québécoise de lutte contre la pollution atmosphérique (Stratégies Énergétiques).

As per the letter of August 23, 2016, the Board requested comments on TIK's notice of motion and Stratégies Énergétiques letter. TFN is successor to the Algonquin band who traditionally used and occupied the territory which the Energy East project will cross. Their members can trace their ancestry and continued use and occupation of this territory back to time immemorial.

TFN is recognized as a "Band" within the meaning of the *Indian Act*, and within the meaning of "Indian peoples" as set out in section 35 of the *Constitution Act*, 1982. TFN has never entered into a land cession treaty surrendering its Aboriginal rights and title; nor have they authorized any other nation or entity to negotiate on their behalf for such title and rights. Therefore, their Aboriginal rights and title have never been extinguished and exist to this present day, over lands which the proposed project will cross. These lands risk being severely impacted by the proposed Energy East Project

TFN is deeply concerned about the actions of Board Members Gauthier and Mercier. The reviewing panel Members have created a dangerous precedent that if not addressed, will allow panel Members to use their respective influence to secretly address any issue that it sees fit without the input from other stakeholders who may be impacted. This cannot be the intended outcome of the panel Members review. Therefore, we ask that the Board grant the requested motion and Members Gauthier and Mercier recuse themselves from the Panel hearing the Energy East application. TFN is of the opinion that no panel Member should be able to continue in their capacity when the issue of public confidence in the rule of law and the goal of reconciliation between Indigenous Peoples and the Crown is clearly at issue. The Board should not condone such activity.

While it may have been inadvertent, there is a danger that Panel Members Gauthier and Mercier may have brought the administration of justice into disrepute. TFN now perceives that it has no venue where it can properly address its concerns on a Project that may potentially impact its constitutional rights. TFN is concerned that this practice will permit other panel Members to wield their unfettered influence in future matters.

The Board Members' conduct destabilizes TFN's confidence in the Board Panel review. How might any of the interveners appearing before Members Gauthier and Mercier in this proceeding expect fairness in accordance with the rule of law? Moreover, in an era of reconciliation of the historical relationship between Canada and Indigenous Peoples, the Board Members' conduct evidences bias and serves to widen, not reconcile, the widening gap.

Specifically, TFN submits the following actions give rise to a reasonable apprehension of bias:

i) The January 15, 2015, private meeting at the offices of Mr. Charest's Lawyer attended by Members Gauthier and Mercier, Chairman and CEO Watson, two Board staff, Mr. Charest and Mr. Charest's lawyer where issues directly related to the Energy East application were discussed, including: "The potential to "carve out a chapter of the decision" for some purpose;

ii) The subsequent quote from a Board spokesman following the January 15, 2015 meeting stating, "[t]he NEB was not lobbied in any way during [the Charest meeting] and the Energy East proposal was not discussed." which was later proved to be false;

iii) The Board continuing to maintain, in light of contrary facts, that the NEB officials attending the Charest meeting did not permit any "inappropriate discussion" of matters related to pipeline projects being adjudicated by the Board, including Energy East.

Based on the facts that have been provided to date and the Board's subsequent denial of these discussions it is difficult to see how an informed person, viewing the matter realistically and practically and having thought the matter through, would think that it is more likely than not that Members Gauthier and Mercier consciously or unconsciously would decide the matter fairly.

TFN submits that this is a serious matter and that actions must be undertaken by the Board to ensure that other panel Members do not see Members' Gauthier and Mercier conduct nor the Board's review of their actions as carte blanche to act contrary to the administration of justice; undermine public confidence in the Board's review process; and potentially stand against the interests of Indigenous Peoples.

Respectfully Submitted,

Scott Robertson, Nahwegahbow Corbiere